IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 24, 2006

STATE OF TENNESSEE v. JAMES W. MINTLOW

Appeal from the Criminal Court for Davidson County
No. 2004-D-2571 Mark J. Fishburn, Judge

No. M2005-01208-CCA-R3-CD - Filed April 6, 2006

The defendant, James W. Mintlow, appeals from his conviction for sale of less than one-half gram of cocaine, a Class C felony. The trial court sentenced him to a ten-year sentence to be served as a Range III, persistent offender in the Department of Correction. The defendant asserts that the evidence was insufficient to support his conviction and that the trial court erred in denying his motion for a mistrial after a witness testified that he had previously testified at the defendant's probation hearing. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Ross E. Alderman, District Public Defender; and James P. McNamara (on appeal) and Gary C. Tamkin (at trial), Assistant Public Defenders, for the appellant, James W. Mintlow.

Paul G. Summers, Attorney General and Reporter; Jane L. Beebe, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; James Todd and Russell F. Thomas, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

This case relates to the defendant's sale of cocaine to an undercover officer. At the trial, Metropolitan Nashville Police Detective Danny Warren testified that he worked for the crime suppression unit, which was in charge of street-level narcotics and prostitution. He said he worked undercover and had been involved in more than one hundred arrests. He said that on July 8, 2004, he was working undercover and pulled to the corner of Lafayette and Lewis Street where the defendant and several other people were standing. He said that he rolled the window down, that the defendant approached his car, and that he asked the defendant, "Hey, man, where's all the women at?" He said the defendant said, "Oh man, they're around." He said he told the defendant, "I'm

actually looking for some hard," which is street slang for crack cocaine. He said the defendant entered the passenger side of his car.

Detective Warren testified that the defendant directed him to an apartment complex on Third Avenue near Cameron Street and told him they could get it from "Little Shorty," the nickname for Terrence Collins. He said he asked the defendant for a "20-rock" but the defendant replied, "No, just give me 10 right now. Then if it's any good, we'll come back and get the rest later." He said, "Many times in these operations, when somebody gets in the car with you like that, a lot of times their motivation is one of two things, either they'll want a pinch of the rock, meaning I'll go get it for you, I'll give it to you, then you give me a little back in return for me going and getting it for you. Or I've even had some say, 'Hey, just give me two or three dollars for a cold beer.'" He said the defendant did not ask him for either. He said that he handed the defendant a ten-dollar bill that had been photocopied and that the defendant left the car. He said the defendant walked up to Mr. Collins, a short black male. He said he saw a hand-to-hand transaction between the defendant and Mr. Collins. He said the defendant came back to his car, got into the car, and scraped off several small white rocks into his hand. He said that the defendant was gone for about thirty seconds and that he never lost sight of the defendant.

Detective Warren testified that after the defendant handed him the cocaine, he gave the take-down signal. He said that he was wearing a wire to allow other officers to hear what was happening but that the conversation was not being recorded. He said Detective Wilson came to the car, opened the passenger side door, and took the defendant into custody. He said that Mr. Collins was also placed under arrest and that the buy money was found on Mr. Collins. He said a "dime" of cocaine, ten-dollars worth, was a very small amount of cocaine, about "half of a pinky nail."

On cross-examination, Detective Warren acknowledged that the bag of cocaine shown to the jury contained the cocaine the defendant gave him and that a "tiny bit" was used in the field test and in the testing by the Tennessee Bureau of Investigation (TBI). He said that on July 8, 2004, he was working undercover and was driving a regular car and wearing a mechanic's outfit. He acknowledged he was familiar with the neighborhood and had bought cocaine there in the past. He acknowledged that it was around 9:00 p.m. and that he saw four or five men, including the defendant, standing by the side of the liquor store not doing anything illegal. He acknowledged that he had never seen the defendant before and that the defendant was not under surveillance.

Detective Warren acknowledged that although he testified on direct examination that he told the defendant he was looking for some "hard" before the defendant got into his car, he may have testified previously that it was after the defendant entered the car. He acknowledged that when he told the defendant he wanted cocaine that the defendant did not have any to sell to him. He acknowledged he never told the defendant he would give him money and never promised him anything for getting him the cocaine. He acknowledged that the defendant did not have any cocaine, money, cell phones, beepers, scales, or drug paraphernalia on him and that the buy money was found on Mr. Collins. He acknowledged Mr. Collins was arrested but never formally charged with selling drugs related to the present incident.

On redirect examination, Detective Warren testified that the defendant told him where to drive and told him they would get the cocaine from "Little Shorty" before they arrived at the location. He said that other people were on the street buying and selling cocaine but that the defendant went to Mr. Collins to buy the cocaine. He said Mr. Collins had not been charged in this case because the night he was arrested he told Detective Warren about other drug dealers in the area and was going to act as a confidential informant.

Metropolitan Nashville Police Detective Daniel Newborn testified that he worked for the crime suppression unit and that on July 8, 2004, he was working with Detective Warren on a "buy/bust." He said he assisted as surveillance and as a take-down officer. He said they had a listening device and followed Detective Warren's car. He said he saw the defendant leave Detective Warren's car and make the drug transaction. He said he assisted in taking the defendant and Mr. Collins into custody and field tested the substance, which tested positive for cocaine base. He said he found the buy money on Mr. Collins.

Metropolitan Nashville Police Detective Olivia Wilson testified that she worked for the crime suppression unit and that on July 8, 2004, she was working with Detective Warren on a "buy/bust." She said she was listening to the conversation between Detective Warren and the defendant via a wire Detective Warren was wearing. She said that when Detective Warren gave the take-down signal, she moved in and took the defendant into custody. She said she searched the defendant and did not find anything on him.

TBI Agent Glen J. Glenn testified that he was a forensic scientist and had performed the testing on the cocaine in this case. He said that before he tested the substance, he weighed the substance and found it weighed 0.1 gram. Agent Glenn testified that approximately ten percent of the substance was used up in the testing of the substance. He said his original forensic report stated "the rocklike substance contains cocaine, schedule II, 0.1 grams." On cross-examination, Agent Glenn acknowledged that the substance was not 0.1 grams of pure cocaine but that it may have contained other substances. He acknowledged he did not know if the substance could have been contaminated before he received it. The parties stipulated that the substance contained a cocaine base.

The jury found the defendant guilty of sale of less than one-half gram of cocaine. The trial court imposed a ten-year sentence to be served in the Department of Correction as a Range III, persistent offender.

The defendant contends that the evidence was insufficient to support the jury's verdict and that the trial court erred in denying the defendant's motion for a mistrial when Detective Warren testified that he had previously testified at the defendant's probation hearing. The state contends that the evidence was sufficient to support the defendant's conviction for sale of less than one-half gram of cocaine and that the trial court properly denied the defendant's motion for a mistrial because it gave an appropriate curative instruction.

I. SUFFICIENCY OF THE EVIDENCE

The defendant contends that the evidence was insufficient to support his conviction for sale of less than one-half gram of cocaine because the evidence "preponderates in favor of a finding of a 'casual exchange' of a small amount of a controlled substance rather than a felonious sale." The defendant contends that a casual exchange occurs when the transfer of the controlled substance is made without design and that the evidence clearly demonstrates the exchange was without design. The defendant asserts that the amount of cocaine involved was very small and that no evidence shows the defendant acted with a pecuniary motive. In the alternative, the defendant asserts the evidence at the trial preponderates in favor of finding him guilty of facilitation of the sale of cocaine because he only intended to buy the drugs with someone else's money and did not receive any reward or compensation.

The state contends the evidence was sufficient to support the defendant's conviction. The state asserts no evidence exists in the record of any circumstances from which the jury could infer the exchange between the defendant and the detective was casual. The state asserts that the defendant was making and directing the sale and that the evidence shows the defendant's supplying the detective with cocaine was designed and deliberate, not spontaneous. The state asserts the defendant was guilty of more than facilitation because facilitation must be committed "without the intent required for criminal responsibility." The state asserts its theory at the trial was the defendant was criminally responsible because he intentionally assisted in the commission of the sale of cocaine. The state asserts it is a logical conclusion that the defendant believed he might get a share in the drugs or that he was part of a sales team with Mr. Collins. The state asserts that it is not required to show the benefit to the defendant under the criminal responsibility statute but that it is enough to show the defendant intended the sale.

Our standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). We do not reweigh the evidence; rather, we presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions about witness credibility were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

Tennessee law prohibits a person from knowingly selling a controlled substance. T.C.A. § 39-17-417(a)(3).

> "Knowing" refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's

> conduct when the person is aware that the conduct is reasonably certain to cause the result.

T.C.A. § 39-11-302(b). Additionally, the defendant is criminally responsible for an offense committed by another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the [defendant] solicits, directs, aids, or attempts to aid another person to commit the offense." T.C.A. § 39-11-402(2). Criminal responsibility is not a separate crime but is "solely a theory by which the State may prove the defendant's guilt of the alleged offense . . . based upon the conduct of another person." State v. Lemacks, 996 S.W.2d 166, 170 (Tenn. 1999). Therefore, in order for the jury to find the defendant guilty of sale of less than one-half gram of cocaine, the state must prove that the defendant knowingly sold less than one-half gram of cocaine or that he was criminally responsible for the sale of the cocaine by someone else.

In this case, the evidence viewed in the light most favorable to the state reveals that when Detective Warren drove up and rolled down his window, the defendant approached his window. Detective Warren told the defendant he was looking for some "hard," and the defendant got into Detective Warren's car, told him where to drive, and said they would get the cocaine from "Little Shorty." Detective Warren asked the defendant for a "20-rock" but the defendant replied, "No, just give me 10 right now. Then if it's any good, we'll come back and get the rest later." The defendant left the car, approached Mr. Collins, exchanged the ten-dollar bill for the cocaine, returned to the car, and handed the cocaine to Detective Warren. The ten-dollar bill Detective Warren gave to the defendant was found on Mr. Collins upon his arrest. A field test and TBI laboratory test confirmed the substance was 0.1 gram of cocaine. We conclude a rational juror could have found beyond a reasonable doubt that Mr. Collins knowingly sold cocaine to Detective Warren and that the defendant, intending to assist in the commission of this offense, aided him by making the exchange of the money for the cocaine. The defendant is not entitled to relief on this issue.

II. MOTION FOR A MISTRIAL

The defendant contends that the trial court erred in denying his motion for a mistrial when Detective Warren testified he had previously testified at the defendant's probation hearing, which was inadmissible and prejudicial. The defendant contends the only proper remedy was a mistrial. The defendant asserts that he was prejudiced because his state of mind at the time of the transaction was the only issue in the case and that his defense was it was a casual exchange, rather than a felony sale. The defendant asserts that because the trial court was uncertain if jurors heard the statement and the trial court would not grant his two requests for a mistrial, that choosing between a curative instruction specifically addressing the statement and a more general one was "pure guesswork." The defendant submits the trial court should have granted a mistrial, rather than forcing "trial counsel to make a blind decision based entirely on speculation."

The state contends that the trial court properly denied the defendant's motion for a mistrial because it gave an appropriate curative instruction. The state asserts the defendant's decision to

choose the vague instruction was a wise and valid trial strategy because there was a definite possibility the jury did not hear the statement. The state asserts the trial court did not abuse its discretion in denying the mistrial and allowed the defendant to choose the instruction he wanted, which was a sufficient remedy. The state asserts the jury is presumed to have followed the court's curative instruction.

The record reveals that during Detective Warren's cross-examination, defense counsel asked the witness about an inconsistent statement he made at a previous hearing. The assistant district attorney and trial court asked for clarification as to what hearing defense counsel was referring. As defense counsel was responding, the assistant district attorney interrupted and told the trial court the jury needed to be sent out of the courtroom. The jury was sent out, and the following conversation took place.

[STATE]: I'm sure it was accidental, and I heard it, and I don't know if Your Honor heard it, but Detective Warren, when we were getting into the previous hearing, October 15th, and I kind of looked curious, and you know, October 15th, that wasn't jail docket, that wasn't Friday, the Detective said, "probation hearing," and I heard it.

THE COURT: I didn't.

[WITNESS]: I'm sorry, but I did say that.

[STATE]: Now, it was very, very quiet. He kind of mouthed it. I was kind of reading [his] lips and hearing at the same time. I know he didn't mean to do anything.

[WITNESS]: Yes, I apologize for that to everybody.

[STATE]: Yes. So, the question becomes, who heard it, or whether or not you even say anything about it because I know you didn't hear it, you're closer to the Detective than me. So, I was kind of reading lips at the same time too.

THE COURT: Did anybody hear it?

[COURT OFFICER]: I didn't hear it, no, sir.

THE COURT: Did anybody hear it, outside the - -

[DEFENSE]: Well, [the defendant] heard it.

[STATE]: So, I don't know if you want to draw attention to it or not or. I just felt that I was obligated to bring it to the Court's attention.

The defense counsel moved for a mistrial. The trial court said, "I just don't think that the jury, for the most part, if at all, heard it." The trial court said it would not grant the mistrial and asked the defendant if he would like a curative instruction specifically addressing the witness's statement or a more general one. The defense counsel opted for the more general instruction but stood on his request for a mistrial. When the jury returned to the courtroom, the trial court gave the following instruction.

> You've already heard references to prior hearings in this matter, please don't concern yourself with anything regarding the prior hearings that have occurred in this case. It has nothing to do with the issue that's before you today, and that is whether or not [the defendant] is guilty or not guilty of this particular offense. . . . I am instructing you specifically, you are not to concern yourself whatsoever with what occurred in those prior hearings, what those prior hearings are about, and we just wanted to make sure we were on the same wavelength, but those are common practice. Don't get back there and start speculating, don't think about it, think about what's going on in here today and tomorrow in terms of what the testimony is and anything you've heard about prior hearings, you're just to disregard, other than the fact that, you know, the reason they even referenced prior hearings is to bring the witness into focus on exactly when they were talking about prior statements being made and things of that nature.

The decision of whether to grant a mistrial is within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). Normally, a mistrial should be declared only if there is a manifest necessity for such action. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). This court will not disturb that decision unless there is an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990); State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). A manifest necessity exists when "no feasible alternative to halting the proceedings" exists. State v. Knight, 616 S.W.2d 593, 596 (Tenn. Crim. App. 1981). The defendant bears the burden of establishing a manifest necessity. State v. Seay, 945 S.W.2d 755, 764 (Tenn. Crim. App. 1996).

Detective Warren's statement that he testified previously at the defendant's probation hearing was inadmissible because the trial court had granted the defendant's motions in limine prohibiting testimony about the defendant's prior bad acts and asking the court to caution witnesses "to confine

their testimony to that which is responsive to the questions asked . . . [and] not to volunteer information regarding past bad acts of the defendant." When determining whether a mistrial is necessary after a witness has interjected improper testimony, this court has often considered the following factors: (1) whether the improper testimony resulted from questioning by the state or was a gratuitous declaration, (2) the relative strength or weakness of the state's case, and (3) whether the trial court promptly gave a curative instruction. See State v. Paul Hayes, No. W2001-02637-CCA-R3-CD, Shelby County (Tenn. Crim. App. Dec. 6, 2002).

In this case, the statement made by Detective Warren was not elicited by the state but was spontaneously offered by the witness when the parties and court were trying to ascertain to which hearing the defense counsel was referring. Secondly, we previously determined the evidence was sufficient for the jury to find that the defendant committed the offense. As for the last factor, the trial court provided the jury with a curative instruction that did not highlight the objectionable testimony. The trial court told the jury, "[Y]ou are not to concern yourself whatsoever with what occurred in those prior hearings [or] what those prior hearings were about." The state brought the statement to the attention of the trial court as soon as the statement was made, and the trial court immediately gave a curative instruction. This court has previously recognized that when improper testimony is given at a trial that if the trial court gives a prompt curative instruction that a manifest necessity for a mistrial is avoided. See State v. Hall, 947 S.W.2d 181, 184 (Tenn. Crim. App. 1997).

The trial court offered to give a specific instruction regarding the statement but defense counsel chose the more general instruction because it was unclear if the jury even heard the statement. The record reflects that the defendant and the assistant district attorney were the only people in the courtroom who heard the statement. The record also reflects that the judge, the court officer, and the court reporter did not hear the statement. The trial court denied the motion for a mistrial stating

> I'm not sure if the jury heard any of this. I did not hear it. The court reporter did not hear it. My clerk did not hear it. My clerk is closer than anyone to [Detective Warren] in this particular case. So, I think there's a strong likelihood that the jurors did not hear or understand what was said.
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> . . . .
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> I'm not disputing that he said it. In fact, he admits that he said it. The Officer admits that he said it, I just don't think that the jury, for the most part, if at all, heard it.

We recognize that at the motion for a new trial the trial court recognized the possibility that "some of the jurors may have heard it as well, I don't know." However, the record does not reflect that any of the jurors actually heard the statement by Detective Warren. We conclude that the defendant has

failed to establish that manifest necessity existed to warrant a mistrial and that the trial court did not abuse its discretion. The defendant is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, JUDGE